No. 34749

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

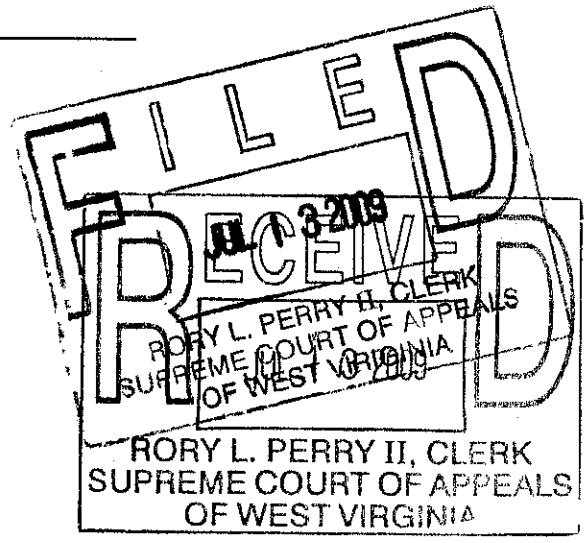
KEITH WEST and SUSAN WEST,

Plaintiffs Below, Appellees,

vs.

THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public agency of the State of West Virginia;
PAUL A. MATTOX, in his capacity as the Commissioner of Highways,

Defendants Below, Appellants.



REPLY BRIEF TO APPELLEES' BRIEF

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REPLY BRIEF TO APPPELLEES' RESPONSE BRIEF

Pursuant to Rule 10(c) of the West Virginia Rules of Appellate Procedure, the West Virginia Department of Transportation, Division of Highways, a department or agency of the State of West Virginia ("DOH"), and Paul A. Mattox, in his capacity as Commissioner of Highways ("Commissioner Mattox" and collectively "DOH" or "Appellants") file this Reply Brief to Appellees' Brief in Response to Appellants' Brief[1] filed by Appellees, Keith West ("Mr. West") and Susan West ("Mrs. West" and collectively "Wests" or "Appellees").

Taking the discussion at pages 28 of Appellees' Brief (or "Response Brief") as a cross-assignment of error, see Hoover v. Moran, 222 W.Va. 112, 662 S.E.2d 711 (2008), this Reply Brief will initially address whether the Circuit Court's deferred ruling upon the issue of additional insurance is ripe for this Court's consideration. Thereafter, the Reply Brief will take up other improper propositions touted by Appellees.

I. The Circuit Court erred in failing to remit the judgment amount to $1 million.

A. The decision of the Circuit Court regarding additional insurance is ripe for consideration.

Appellants filed a pleading styled, "West Virginia Department of Transportation, Division of Highways' Motion for the Court's Clarification Regarding Whether Any Part of the Judgment Order is Final for Purposes of the Running of the Time for Appeal" with the Circuit Court. In doing so, DOH brought to the Circuit Court's attention that third parties had moved the court for an order permitting intervention to adjudicate the rights of those parties with respect to whether "other insurance will apply to pay the judgment through a Zurich or an American Guarantee policy under which DOH was specifically named as an additional insured for damages caused by its own

[1] Appellees filed a Motion for Leave to exceed the page limitation. The Court denied the motion. The order denying the motion also set the time period for Appellants to file their reply brief.

negligence." Page 27 of Appellees' brief. DOH filed this pleading out of a concern over the finality of its appeal as to the $8 million judgment against it including the issues involving other insurance and any confusion caused by the pending discovery pursuant to the Circuit Court's order.

But all of these matters were decided by the Circuit Court's order dated September 26, 2008, wherein the court deemed these matters were final and, accordingly, a part of any appeal by DOH.

> As for WVDOT's Motion For The Court's Clarification Regarding Whether Any Part of the Judgment Order is Final For Purposes Of The Running Of The Time For Appeal, the Court hereby FINDS that its post-trial Order entered on the 24th day of June was "final" as it pertains to its denial of all trial issues relating to the WVDOT's "Renewed Motion for the Entry of a Judgment as a Matter of Law, or Alternatively, Motion for the Entry of an Order Granting a New Trial," and, as it pertains to the WVDOT's "Motion for Entry of an Order Modifying or Altering Judgment" was not final, but rather was "deferred" pending resolution of the aforementioned insurance issues and complaint for declaratory relief.
>
> (Order entered by Judge Mazzone on September 24, 2008.)

DOH having brought the issue of clarification to the Circuit Court's attention, with full participation by Appellees, Mr. and Mrs. West can hardly complain in their brief that the issue is not ripe for decision now.

B. This Court should grant a remittance of the judgment.

This Court's task is made easier by the stipulation of Appellees at page 28 of their Response Brief:

> The appellees, contrary to appellant's blanket and unsupported assertions, admittedly cannot, are not and will not seek to collect funds from the State's Treasury.

Based on this stipulation, then (liability issues aside) this Court should immediately remit the judgment from $8,030,298.33 to the coverage of $1 million.

Using the de novo standard for a question of law (and common sense), this Court can dispatch with Appellees' additional insured argument. The coverage available to DOH through the Zurich and American Guarantee policies (if any) is wholly predicated on the policies being issued to Penn Line Service, Inc. ("Penn Line"), a contractor for DOH that repaired the guardrail that Mr. West did not touch with his vehicle. This policy is not the type of insurance sufficient to eliminate DOH's constitutional immunity, because the policies were not obtained through any contract with the State Board of Risk and Insurance Management ("BRIM") to protect the State. See W.Va. Code §29-12-5(a) (4) (2004). These policies issued to Penn Line do not stand in the place of an insurance policy issued to BRIM for the purpose of protecting the State from damages accruing to it. Pittsburgh Elevator Code v. W.V. Bd. of Regents, 172 W.Va. 743, 310 S.E.2d 675 (1983).

Appellants were not specifically listed as additional insured's on the Zurich or the American Guarantee policy. Rather, The West Virginia Department of Transportation ("DOT") was listed as an additional insured on the certificate of liability insurance in connection with the $1 million general liability policy issued to Penn Line by Zurich. And the DOT was not listed as an additional insured under the $20 million umbrella policy issued by American Guarantee.

Appellees' contentions about additional insurance are abrogated by Appellees' settlement with Penn Line. These are not insurance policies dealing with the DOH's alleged negligence in the West case -- the Zurich and American Guarantee policies pertain ***only to the extent that DOH is liable for acts of negligence committed by the contractor.*** Under the terms of the standard specifications as well as the language of the Additional Insured Endorsement to the certificate of liability insurance policy, the DOT would not be insured for its own negligence. It would only be covered for liability arising out of Penn Line's operations performed for the DOT. Here, the underlying personal injury claim proceeded to trial solely against Appellants and not Penn Line;

the verdict did not address any liability of Penn Line, which settled the case against it. There is no finding of negligence against Penn Line and so there can be no coverage under the policies issues to Penn Line.

This Court emphasized in J.H. v. W.Va. Div. of Rehabilitation Services, 2009 WL 1835936 (W. Va.), that a party like Appellees can recover state funds only if it is alleged that the recovery is sought up to the limits of the state's liability insurance coverage. J.H. at 8. Otherwise, the claim falls outside the traditional constitutional bar to bring suit against the state. Id. Emphasizing both Pittsburgh Elevator and Parkulo v. West Virginia Bd. of Prob. ad Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996), this Court in J.H. predicted the outcome of this appeal: the judgment (if there is liability) must be remitted to the limits of the policy.

C. There is coverage only if this policy is unmodified by Endorsement No. 7.

Appellees at page 13 of their Response Brief couch the issue succinctly: there is no dispute that the insurance policy issued to Appellants, if unmodified by Endorsement No. 7, provides coverage for the judgment.

The gravamen of Appellants' brief is that this Court should maintain the emphasis favoring immunity over Appellees' construction of the Endorsement: which is to apply private contract of insurance law to determine if Endorsement No. 7 was made a part of the policy. Response Brief, p. 14.

Our brief highlighted the context of the State's insurance program. By statute, there is a State Board of Risk and Insurance Management, W.Va. Code §29-12-1, et. seq. (See Appellants' brief pp. 12-16). Contrary to Appellees' assertion (Response Brief p. 16), BRIM need not be a party to this action. BRIM is a creation of the Legislature and has a defined role in that "good business and insurance practices and principles necessitate the centralization of responsibility for

the purchase, control and supervision of insurance coverage on all state properties... ." Id. This is a custom designed policy.

It is not a question of BRIM being a necessary party to litigation and whether there was a "meeting of the minds" over Endorsement No. 7. Appellees' Brief, p. 16. Appellees' argument at pages 14 to 20 of the Response Brief is based upon a private insurance model -- not a legislatively-mandated insurance model. Again, there is a statutory design at work in this case. Pursuant to BRIM's insurance policy, State agencies have immunity from suit with the understanding set forth in Pittsburgh Elevator that there is a waiver of that immunity only to address citizens injured by direct negligence of the agency. The Legislature created a system which identifies which actions are covered or not covered by that insurance. It is not a privately negotiated contract with a "meeting of the minds" as Appellees would suggest in their Response Brief. The context is a narrow carve out from immunity.

Pursuant to BRIM's insurance policy, DOH accepts responsibility for any negligent act where its employees are physically present at the site of the accident and directly engaged in performing construction, maintenance, repair or cleaning. Those are the conditions precedent for the State's insurance policy to trigger. Here, Endorsement No. 7's preclusion of coverage for guardrails reflects the good business practices of an agency charged with overseeing thousands of miles of roads.

As this Court recently acknowledged in J.H., immunity trumps unless there is an exception. Here the Circuit Court erred when it found that the policy was in place but the endorsement ambiguous. The Legislature gave BRIM authority to modify the policy by incorporating an endorsement. And the endorsement was effective with or without signature.

D. The Circuit Court erred in depriving the jury of the opportunity to evaluate the negligence of the driver.

This case cries out for a new trial because the jury instructions and the verdict form were in error. Mr. West was a passenger in the truck driven by his father, who settled with Appellees, according to the Response Brief at footnote 2, p. 35, before DOH hired its lawyers.

The essential error of the case is the Circuit Court allowed the case to go forward against DOH as the sole proximate cause of the accident. The verdict form and the jury instructions all said that DOH was "a proximate contributing factor" [Verdict Form para. 1] but the jury was left totally without direction about the driver's role in causing the injuries.

The jury could and most likely would have found that the driver was a proximate cause of the injuries, given that it was a single car accident and the driver lost control of the vehicle. But the driver's negligence was not on the verdict form. The judge restricted the jury from assessing the fault of the driver. DOH could only be liable if it was an intervening cause of the accident. Here, the Circuit Court by its verdict form determined DOH was not only a contributing cause but the sole contributing cause.

Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E.2d 338 (2000) explained the concept of intervening cause:

> " 'An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operated independently of any other act, making it and it only, the proximate cause of the injury.' Syllabus Point, 16, Lester v. Rose, 147 W.Va. 575, 130 S.E. 2d 80 (1963) [modified on other grounds, State ex rel. Sutton v. Spillers, 181 W.Va. 376, 282 S.E.2d 570 (1989)]." Syllabus Point, 1, Perry v. Melton, 171 W.Va. 397, 299 S.E.2d 8 (1982).

The driver set this single car accident in motion. And Appellees presented evidence that but for the guardrail being bent backwards, the driver may not have continued over the hill. [This was

a disputed fact.] Nevertheless, how does a jury appropriately separate out the driver's negligence? The Circuit Court refused DOH's entreaty for a jury instruction or place on the jury verdict to ascribe a percentage of negligence to the driver. (See Appellants' Brief, p. 31).

The Circuit Court completely sidestepped intervening cause issues and left the jury with only one choice: DOH was the sole proximate cause of the injuries. The jury was deprived of the opportunity to evaluate the negligence of the driver and how he related to the accident.

Again, Harbaugh is instructive:

> [12] In syllabus point thirteen of Anderson v. Moulder, 183 W.Va. 77, 394 S.E.2d 61 (1990), this court emphasized the significant role of the concept of forseeability in the determination of intervening cause, as follows: "A tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct." *See also* Hairston v. Alexander Tank and Equipment Co., 310 N.C. 227, 311 S.E.2d 559,567 (1984).

Plaintiff's theory of the case has to be that the negligence of the driver is not a contributing factor because the Circuit Court's rulings made DOH the sole proximate cause of the accident. Both DOH and the driver may have been a proximate cause of the accident; but, DOH alone could not be the proximate cause. Based upon the verdict form, the jury could reach only one conclusion involving one defendant and that conclusion eliminated consideration of the driver's negligence.

The jury could not have understood the instructions about "a" proximate contributing factor causing injuries and damages (Verdict Form) when the party that put the accident in play was not identified on the verdict form.

Louk v. Isuzu Motors, Inc., 198 W. Va. 250, 479 S.E.2d 911 (1996) teaches that a recovery may be had against all of the parties whose negligence proximately contributed to the injury. (Appellants' Brief, p. 32.) It was not harmless error to eliminate the jury's consideration of the

driver's negligence. To disguise the driver's negligence by the very artful description of DOH's role as "a" proximate contributing factor to Plaintiffs' injuries and damages is reversible error. The absence of treatment of the driver on the verdict form -- coupled with the absence of a jury instruction explaining his role -- was completely unfair to DOH. It calls for a reversal of judgment and direction for a new trial.

II. Conclusion

For the reasons stated herein and in the Appellants' Brief, we respectfully ask this Court to grant the relief prayed for at page 38 of our brief.

RESPECTFULLY SUBMITTED,

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, and **PAUL MATTOX**, in his capacity as the Commissioner of Highways

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Defendant Below/Appellants.

CERTIFICATE OF SERVICE

I, Charles L. Woody, counsel for Defendants/Petitioners, do hereby certify that I have served the foregoing **"Reply Brief to Appellees' Brief"** upon counsel of record by depositing a true and exact copy thereof in the United States Mail, First Class postage prepaid, this the 13th day of July, 2009, addressed as follows:

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